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No. 81-1023

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 359, UNITED SEAFOOD WORKERS, SMOKED FISH AND CANNERY UNION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court properly instructed the jury on the issue of willfulness under 29 U.S.C. 186.

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OPINION BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1981. The petition for a writ of certiorari was filed on November 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner, a labor union, was convicted on 46 counts of demanding and receiving illegal labor payments from 46 employers, in violation of the Labor-Management Relations Act, 1947 ("Taft-Hartley Act"), 29 U.S.C. 186(b)(1) and (d). Petitioner was

fined a total of $200,000. The court of appeals affirmed (Pet. App. 1a-2a).

Petitioner conceded (Pet. 3) all the facts necessary to sustain the convictions, contesting only the allegation that it acted willfully within the meaning of 29 U.S.C. 186(d). The proof at trial established that petitioner, a labor organization that represents all workers who handle fish in New York City's Fulton Fish Market (the area on the Lower East Side in which the city's wholesale fish industry is located), received substantial payments over a five-year period from the wholesale fish companies that employed the employees represented by petitioner (Tr. 18-21, 38-54). Beginning in 1975, petitioner "leased" small cardboard signs to those companies for a charge of $25 a month, or $300 per year (Tr. 45, 51-53). Petitioner sent delinquency notices to companies that fell behind in their payments (Tr. 54-60; Gov't Exhs. 106A, 106B). Union records introduced at trial showed that, between 1975 and 1980, 46 wholesale fish companies paid petitioner amounts totalling more than $66,000 for the signs (Tr. 42-48; Gov't Exhs. 104, 104C).

ARGUMENT

Petitioner contends (Pet. 3-12) that the district court erred in refusing to charge the jury that the phrase "willfully violates" in 29 U.S.C. 186(d) requires proof that "the defendant showed a reckless disregard for the provisions of § 186" and had "knowledge that this conduct is likely to be illegal" (Pet. 3, 4). The court of appeals correctly approved the district court's charge on this issue, and, contrary to petitioner's assertions, the circuits are not divided on the question. Review of this case is therefore not warranted.

1. We submit that the court properly instructed the jury (Tr. 194-195) that, under Section 186, willful conduct "is conduct that is done deliberately and voluntarily," *i.e.*, that "the government need only prove that [petitioner's] officers

or employees * * * knew that they were requesting, demanding, receiving, or accepting * * * money from employers of employees that the [petitioner] represented," and that the government "need not prove that a defendant knew about the Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate that statute" or that a defendant "thought that he or she was doing anything wrong or illegal."[1]

In *United States* v. *Ryan*, 350 U.S. 299, 305 (1956), this Court reviewed the legislative history of 29 U.S.C. 186 and observed that it is "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions,

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[1]The court's charge was, in relevant part, as follows (Tr. 194-195):

> To prove a violation of the Taft-Hartley Act, the government need not prove that a defendant knew about the Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate that statute. It is enough to satisfy this element if the government proves beyond a reasonable doubt that the defendant's officers or employees requested, demanded, received or accepted or agreed to accept or receive money or some other thing of value which they knew was from an employer of members of the defendant or of workers who would be admitted to membership by the defendant and they requested, received or accepted the money or thing of value voluntarily, not because of mistake, accident or inadvertence.
>
> Thus, it is not necessary for the government to prove that anyone in the union thought that he or she was doing anything wrong or illegal. To satisfy this element, the government need only prove that the officers or employees of the union knew that they were requesting, demanding, receiving or accepting or agreeing to receive or accept money from employers of employees that the defendant represented.
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> * * * * *
>
> To put it more simply, to satisfy this element of unlawfully, willfully and knowingly, it is enough for the government to prove beyond a reasonable doubt that the defendant's officers or employees requested, received or accepted money with knowledge that he was requesting, receiving or accepting money, and that the person who was giving him the money was an employer of employees that the union represented.

between employer and representative."[2] Thereafter, the Second Circuit held that Section 186 does not require proof of the kind described in petitioner's requested instruction, and it has approved of the substance of the instructions given in this case. This Court has consistently denied petitions for certiorari in these cases. See *United States* v. *Overton*, 470 F. 2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Ricciardi*, 357 F. 2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966). See also *United States* v. *Scotto*, 641 F. 2d 47, 55 (2d Cir. 1980), cert. denied, No. 80-1679 (June 22, 1981); *United States* v. *Boylan*, 620 F. 2d 359, 361-362 (2d Cir.), cert. denied, 449 U.S. 833 (1980). Nothing in the present case makes it more deserving of review.[3]

2. Contrary to petitioner (Pet. 5-8), the decision here does not conflict with the interpretations adopted by the Seventh and Tenth Circuits. Any contrary suggestion in the language of the decision of the Seventh Circuit in *United States* v. *Inciso*, 292 F. 2d 374, 380, cert. denied, 368 U.S. 920 (1961), has been disapproved by the later holding of that court in *United States* v. *Keegan*, 331 F. 2d 257, 261-262, cert. denied, 379 U.S. 828 (1964), which held that in a prosecution under 29 U.S.C. 186, the jury need not be instructed that the defendant must have acted with knowledge of the law. The *Keegan* court thus approved an instruction that "[t]he word 'willfully' means that the person knowingly and intentionally committed the acts which constitute the offenses charged" and that "[t]he word 'knowingly' * * * does not require * * * that there be any knowledge or

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[2]Therefore there is no occasion to consider petitioner's contention (Pet. 8-11) that the legislative history supports a contrary interpretation.

[3]The Third Circuit is in accord with the Second Circuit's interpretation of 29 U.S.C. 186. See *United States* v. *Pecora*, 484 F. 2d 1289, 1294 (3d Cir. 1973); *United States* v. *Lanni*, 466 F. 2d 1102, 1110 (3d Cir. 1972).

awareness that such act or omission is in fact prohibited by law" (331 F. 2d at 261). It expressly rejected a claim that an instruction similar to that requested by petitioner in this case was required by *Inciso*. Thus, the instruction given here would appear to be proper in the Seventh Circuit.[4]

As petitioner points out (Pet. 6-7), in *Korholz* v. *United States*, 269 F. 2d 897, 903 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960), the Tenth Circuit termed as "accurate" an instruction that required the jury to find either specific intent to violate Section 186 or reckless disregard for the law, but the court did so in the course of affirming a conviction under that more stringent test. Since the instruction approved there was favorable to the defendants, the court was not required to decide whether such an instruction was necessary. Clearly a holding that the charge requested by a defendant was not prejudicial to him is a far cry from a holding that such a charge is necessary. Cf. *United States* v. *Scotto, supra*, 641 F. 2d at 55; *United States* v. *Boylan, supra*, 620 F. 2d at 361-362 (upholding charges that are more favorable to defendants than required).[5]

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[4]Petitioner errs in suggesting (Pet. 6 n.3) that either *United States* v. *Kaye*, 556 F. 2d 855, 863-864 (7th Cir.), cert. denied, 434 U.S. 921 (1977), or *United States* v. *Simpson*, 561 F. 2d 53, 61-62 (7th Cir. 1977), is to the contrary. The only question in *Kaye* was the sufficiency of the evidence. The opinion does not set forth the district court's charge, but expressly restates the holding in *Keegan* on this point. *Simpson* did not involve Section 186 at all.

[5]Petitioner also suggests (Pet. 8 n.6) that because Taft-Hartley violations may be predicate offenses for a violation of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. 1961 *et seq.*, and because the Second Circuit has held that no greater *mens rea* is required to violate RICO than is required for violation of the predicate offenses, sentencing for a RICO violation predicated on Section 186 offenses "would raise serious issues under the Eighth Amendment's prohibition against cruel and unusual punishment." Petitioner argues that this hypothetical constitutional claim "demonstrates * * * the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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fallacy" of the court of appeals' construction of Section 186(d). As the court of appeals correctly noted (Pet. App. 2a), however, this contention is largely irrelevant since this case does not involve RICO; and, in any event, the decision of the 91st Congress to permit violations of 29 U.S.C. 186 to serve as predicate offenses for RICO violations has little, if any, bearing on the intent of the 80th Congress with respect to the proof required for violations of Section 186.

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